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No. 209

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

EARL J. LOMBARD

and

GUARDIAN INVESTMENT CORPORATION, *Petitioners*

v.

THE UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF IN OPPOSITION TO RESPONDENT'S BRIEF

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REPLY

The Evidence

Respondent's truncated statement of some ten days of evidence and testimony on 72 counts in the indictment, couched in terms most favorable to the prosecution, shows by what it does not say that there was, as is usually the case, no direct evidence of the required criminal intent on the part of the defendants. The

individual defendant contended throughout that there had been no evil intent on his part. The evidence also showed that the defendant corporation, during its brief existence, handled total sales of more than $280,000.00 and that the amounts involved in all of the transactions complained of totalled approximately $7,500.00. The evidence also showed that, when each sale was made, the defendant corporation promptly ordered the stock involved if it was not on hand or otherwise available even though at the time of delivery the corporation was unable to pay for it.

The evidence also showed that the petitioner, Lombard, did everything within his power to make the corporate activities successful. He refused to accept any salary after August 4, 1962. He and Dipboye invested $5,000.00 on October 5, 1962 which was after most of the sales charged in the indictment. He met with a Richard Mandel and others in February 1963 at which time Mandel was still considering the investment of sufficient capital in the corporation to solve all corporate difficulties, pay all debts and permit the corporation to resume business.

Defendant Lombard told each of the complaining witnesses that he believed that they would get their stock and that the corporate difficulties would be worked out. There was no evidence that he gave these assurances in bad faith or without reasonable grounds to believe that they were true. Most of these assurances were made prior to or shortly after the additional investment of $5,000.00 by Lombard and Dipboye; prior to or shortly after Lombard refused to accept his salary on August 4, 1962; and several months prior to the meeting with Mandel and others in February, 1963.

The Presumption Instruction

The instruction quoted by respondent in its opposition was one requested by the Government and was given after the instruction quoted by petitioner.

The Court's attention is respectfully called to the fact that respondent has made no attempt in its brief to distinguish the instant case from the *Anzoategui* case, 118 U.S. App. D.C. 337, 335 F. 2d 1000, cited by petitioner, but has simply gone to the Fifth Circuit for supporting authority. If the cases are not distinguishable, the writ should be granted to settle the conflict between the Circuits. But the case of *Estes* v. *United States,* 335 F. 2d 609, cert. den. 379 U.S. 964, cited by respondent is clearly distinguishable from the instant case and the *Anzoategui* case cited by petitioner. In *Estes,* the Court was careful to say that the presumption that a man intends the natural consequences of his acts is a rebuttable one. Our judge didn't say this, and therein lies the conflict, created by this case, between this Circuit and the Fifth Circuit. In *Estes,* the instruction complained of was followed immediately by the statement that "Fraudulent intent is one of the essential elements of the offenses with which this defendant is charged. Fraudulent intent is not presumed or assumed." Our judge didn't say this.

The Bare Bones of the Statute Instruction

Respondent cites *Orton* v. *United States,* 221 F. 2d 632, (C.A. 4), certiorari denied, 350 U.S. 821, as authority for the statement that "when, at the request of the jurors, the Court submitted excerpts from the applicable statutes, there was no reason to repeat other instructions not requested by the jurors." The *Orton* case doesn't even approach the factual situation of

the instant case. In *Orton,* the Court gave the Allen charge. Nothing was said there in the new instruction about the elements of the crime charged. In *Orton,* appellant objected because the judge did not repeat the instruction on presumption of innocence. In the instant case the objection is that the judge gave the jury only the bare bones of the statutes without reminding them that the case law requires a finding of specific criminal intent, unmentioned in the statutes, as an element of each of the crimes charged in the indictment.

Conflicting Instructions

In *Bollenbach* v. *United States,* 326 U.S. 607, 612, the jury had asked for additional instructions. The judge gave them an erroneous instruction. Certiorari was granted by this Court and Mr. Justice Frankfurter said for the Court: (611)

> "But precisely because it was a 'last minute instruction' the duty of special care was indicated in replying to a written request for further light on a vital issue by a jury whose foreman reported that they were 'hopelessly deadlocked' after they had been out seven hours, * * * The influence of the trial judge on the jury is necessarily and properly of great weight and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be a decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptionable and unilluminating abstract charge. (612) * * * A conviction ought not to rest on an equivocal direction to the jury on a basic issue." (613).

While the jury in the case at bar did not report itself deadlocked, and had been out only an hour and a half,

it did ask for additional instructions and received, as "a last minute instruction", what our Court of Appeals has heretofore called an erroneous instruction in *Byrd* v. *United States,* U.S. App. D.C. , 342 F. 2d 939.

Since the presumption charge was erroneous and error was committed by sending the jury the statutes without a reminder that the statutes did not enumerate all of the essential elements of the crime, and since the instructions were conflicting, misleading and equivocal, it is respectfully submitted that the petition should be granted.

BYRON N. SCOTT
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